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No. 90-224

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1990

JON F. BARNES, HOMER L. GIBSON,
JEAN Z. GIPSON, CLARENCE P. KENNEDY,
NORMAN J. MUTH, FEBO C. SPAGNUOLO,
Petitioners,

vs.

GENCORP INC.,
Respondent.

—0—

RICHARD S. NOVITSKY,
Petitioner,

vs.

DIVERSITECH GENERAL, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF

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No. 90-224

REPLY BRIEF

Petitioners submit this brief in response to the arguments contained in the Brief in Opposition—both to demonstrate the overall weakness of the opposing position and to correct several misleading statements and citations appearing therein.

Petitioners will analyze respondents' arguments in relation to the factors which, if applicable, would typically provide the strongest reasons *against* the issuance of a writ of certiorari. Such factors include:

1. The question presented for review is unworthy of consideration by this Court.
2. The evidence in the record is unsuitable for a meaningful resolution by this Court of the question presented for review.
3. Petitioners are raising an argument not asserted in the courts below.
4. The decision below does not fairly raise the question presented for review.
5. Petitioners' cited decisions from other circuits are consistent with the decision below.
6. The decision below was mandated by decisions of this Court.

Petitioners will now proceed to analyze respondents' position with respect to each of the factors enumerated above.

1. Question Presented is Unworthy of Consideration.

Respondents do not deny the significance of the question presented for review. Instead, they repeatedly contend—in the nature of a brief on the merits—that the question was decided correctly by the circuit court and thus review by this Court is presumably unnecessary. But assuming, *arguendo,* that the decision below was indeed correct, that would mean that at least five other circuits have reached *incorrect* conclusions on the same question and—absent a definitive decision by this Court—are likely to continue doing so.

2. Evidence is Unsuitable for Resolution of Question Presented.

Respondents do not challenge the strength of petitioners' statistical evidence—and thus its suitability to serve as the basis of this Court's resolution of the question presented for review. In effect, respondents accept such evidence as constituting a stand-alone prima facie case—just as the Sixth Circuit did.

Unable to challenge petitioners' evidence, respondents instead emphasize the circumstances of their reduction-in-force which gave rise to the claims of petitioners and other discharged employees. *See* Brief in Opposition at 1. In focusing undue attention on economic factors, respondents wrongly imply that the legitimacy of such considerations is somehow an issue in these cases. In fact, petitioners have never questioned respondents' right to reduce their workforce, but only their underlying motives in determining *which* positions and employees to eliminate—motives which in many instances can be exposed only by statistical analysis.

3. Question Presented was not Raised in Lower Courts.

Respondents question petitioners' choice of citations in the circuit court (*see* Brief in Opposition at 13, n.3) but they do not—because they *cannot*—allege a failure by petitioners to timely assert the proposition that their statistical evidence was sufficient to raise a genuine issue of material fact on the issue of pretext. Petitioners' briefs in the Sixth Circuit, while emphasizing decisions of this Court and of the Sixth Circuit, explicitly asserted the sufficiency of the statistical evidence to demonstrate pretext.

Respondents' preoccupation with citations of authority is ironic in that they have yet to cite—either in the lower courts or in this Court—even one disparate-treatment case (except, of course, the decision below) in which summary judgment or a directed verdict was granted, or a plaintiff's verdict reversed, on the grounds that plaintiff's evidence was entirely statistical in nature.

4. Decision Below does not Raise Question Presented.

Respondents embrace the circuit court's disclaimer that it meant to hold that statistics can never establish pretext. *See* Brief in Opposition at 12-13. But it is clear from the panel's initial, emphatic endorsement of petitioners' statistical evidence as constituting a stand-alone prima facie case, and also from the absence of any criticism of the statistics, that if *these* statistics could not satisfy the court on the issue of pretext, no other statistical evidence would have faired any better. The decision below, therefore, squarely raises the question of whether unusually strong statistical evidence can raise a genuine issue of material fact as to pretext.

5. Decisions in Other Circuits are Consistent with Decision Below.

In a desperate attempt to negate or at least obscure the conflict between circuits, respondents misstate petitioners' position beyond recognition while also misrepresenting the import of a number of cases from other circuits. Petitioners surely do not, as respondents contend, espouse a "per se" rule "that any particular statistical evidence is always competent to rebut a legitimate nondiscriminatory reason." *See* Brief in Opposition at 13. Petitioners merely contend that statistical evidence *strong enough to constitute a stand-alone prima facie case* should also be sufficient to raise a genuine issue of material fact on the issue of pretext.

Respondents attempt to dismiss petitioners' cited cases from the First, Second, Fifth, Eighth and Tenth Circuits as being "highly fact-specific," involving "case-by-case analysis of statistics" (*see* Brief in Opposition at 9, 13)—as if that somehow would nullify the common ground on which the cases rest. In each of the cited cases, statistical evidence showing a significant pattern of discrimination was deemed sufficient to demonstrate pretext. For example, the "factual mosaic" referred to by respondents in quoting from *Freeman v. Package Machinery Company*, 865 F.2d 1331, 1342 n.5 (1st Cir. 1988), was comprised entirely of statistical evidence, which was found sufficient to support a jury verdict for the plaintiff.

To be sure, rigorous scrutiny of the statistical evidence was critical to each circuit court's determination that the statistics raised an inference of discrimination, but once that conclusion was reached, it was simply held as a matter of law that such evidence was sufficient to show pretext. Had the Sixth Circuit taken the same view of the law in the appeal below, the court's highly

favorable assessment of petitioners' statistics at the prima facie stage would have compelled an equally favorable conclusion on the issue of pretext. That is precisely the conflict between circuits which respondents seek to obscure.

Respondents also cite two cases, *Moore v. McGraw Edison Company*, 804 F.2d 1026 (8th Cir. 1986), and *Stephen v. PGA Sheraton Resort, Ltd.*, 873 F.2d 276 (11th Cir. 1989), whose inclusion in their brief is both puzzling and illuminating. *See* Brief in Opposition at 15-16. In *Moore*, from which respondents quote a long passage, the employer's successful rebuttal of statistical evidence was decided by the *jury*. Thus, plaintiff's statistical evidence presumably overcame motions for summary judgment and a directed verdict. The circuit court merely concluded that the employer "presented sufficient reasonable factors other than age so that the jury *could* conclude that age was not a factor in the termination . . ." *Moore*, 804 F.2d, at 1031 (emphasis added). Similarly, in *Stephen*, the plaintiff's disparate-treatment claim was rejected by the district court as the *trier of fact*. Moreover, only the disparate-impact claim was appealed, and it was decided by the circuit court on business-practice issues unique to disparate-impact cases.

At best, *Moore* and *Stephen* demonstrate that statistical evidence may be successfully rebutted *at trial*—a point not even remotely at issue in this appeal. More to the point, respondents' citation of these two cases exposes their inability to cite *any* disparate-treatment cases (other than the decision below) in which summary judgment or a directed verdict was granted, or a plaintiff's verdict overturned, on the grounds that plaintiff's case was based entirely on (probative) statistical evidence.

The decision below thus stands alone against the collective wisdom of five other circuits.

6. Decision Below was Mandated by Decisions of this Court.

Notwithstanding respondents' contention that the decision below is "in perfect accord with the decisions of this Court" (*see* Brief in Opposition at 10-12), respondents have in no way justified the circuit court's failure to adhere to this Court's pronouncements on the wide latitude to be given the plaintiff in demonstrating pretext, including the use of statistics. *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 804-05, 93 S.Ct. 1817, 1825-26 (1973); *Patterson v. McLean Credit Union*, _____ U.S. _____, 109 S.Ct. 2363, 2378-79, 2394 (1989). Respondents' arguments merely demonstrate that statistical evidence must be closely scrutinized by the court and, if found to be probative of discrimination, may be rebutted by other evidence at trial.

In their attempt to legitimize the decision below, respondents inaptly cite *Wards Cove Packing Company, Inc. v. Atonio*, _____ U.S. _____, 109 S.Ct. 2115 (1989). *See* Brief in Opposition at 10-11. In *Wards Cove*, the plaintiffs' case was based on statistical disparities in the racial composition of various departments of the same employer. That approach was rejected by this Court, which held that the proper comparison is between the racial composition of the at-issue jobs and of the qualified population in the relevant labor market.

The statistical approach rejected in *Wards Cove* bears no resemblance to petitioners' statistical studies, in which age-group discharge rates were analyzed only *within* particular divisions—i.e., no comparison was made of discharge rates *between* divisions. Moreover, *Wards Cove* is a hiring-and-promotion case, with

applicant-pool issues not present in discharge cases; and it is strictly a disparate-impact case, involving standards of proof not associated with disparate-treatment cases. *Wards Cove* has no applicability to either the factual or legal issues in disparate-treatment cases.

Particularly in reduction-in-force situations, it would be absurd to contend that employers must resort to quotas to avoid exceeding a three-standard-deviation disparity in discharge rates between older and younger workers (all of whom are presumably qualified in the first place). Such gross disparities in discharge rates are so overwhelmingly unlikely to occur by chance that an employer need take only one precaution: Avoid any discriminatory motive.

The conflicting perceptions expressed by the parties in regard to Supreme Court precedent should serve to demonstrate that there is great uncertainty as to how this Court would rule on the critical question presented in the instant Petition. A definitive decision by this Court would promote the consistent enforcement of the ADEA and other discrimination laws while bringing uniformity to the circuits.

CONCLUSION

Based upon the reasons set forth above and in their Petition for a Writ of Certiorari, the petitioners respectfully request that this Honorable Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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